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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-351

SUSAN MARAMAN,
Petitioner,

vs.

GRADY HARDISTER, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

EDWARD M. WALLER, JR., ESQUIRE of
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Whether, in View of the Failure of the Plaintiffs to Allege and Prove Adequate Representation of Any Class by the Named Defendants, in View of the Absence of Proof of Impracticability of Joinder and in View of the Lack of Notice to the Members of Any Such Class, the Trial Court's Mandatory Injunction Directed Against All Such Members Is Invalid under the Fourteenth Amendment to the Constitution As a Denial of Due Process of Law.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

SUSAN MARAMAN,

Petitioner,

vs.

GRADY HARDISTER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, SUSAN MARAMAN, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in these proceedings on April 25, 1972.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is included in the Appendix appended hereto at page A1. The opinion of the District Court of Appeal of the State of Florida, in and for the Second District, a per curiam affirmance, is included in the Appendix appended hereto at page A2. The opinions or orders of the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, are included in the Appendix appended hereto at pages A3-A6.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on April 25, 1972. A timely Petition for Rehearing was denied on June 2, 1972, and this Petition for Certiorari was filed within 90 days of that date. The Order Denying Petition for Rehearing is included in the Appendix appended hereto at pages A6-A7. This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTION PRESENTED FOR REVIEW

The question presented is:

WHETHER, IN VIEW OF THE FAILURE OF THE PLAINTIFFS TO ALLEGE AND PROVE ADEQUATE REPRESENTATION OF ANY CLASS BY THE NAMED DEFENDANTS, IN VIEW OF THE ABSENCE OF PROOF OF IMPRACTICABILITY OF JOINDER AND IN VIEW OF THE LACK OF NOTICE TO THE MEMBERS OF ANY SUCH CLASS, THE TRIAL COURT'S MANDATORY INJUNCTION DIRECTED AGAINST ALL SUCH MEMBERS IS INVALID UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION AS A DENIAL OF DUE PROCESS OF LAW.

CONSTITIONAL PROVISION AND RULE INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of life, liberty or property without due process of law."

Rule 1.220, Florida Rules of Civil Procedure:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all be-

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fore the court, one or more may sue or defend for the whole."

STATEMENT OF THE CASE

Respondent GRADY HARDISTER and fourteen other named Plaintiffs (hereinafter referred to collectively as Respondents) filed a Complaint for Injunctive Relief against Petitioner SUSAN MARAMAN and one other named Defendant seeking removal of certain trailers from the subdivision in which the Respondents own lots. (A8-A18)[1] The Respondents sued the two named Defendants individually and as representatives of a class of all those parties "similarly situated." (A8) Respondents' Complaint indicated that the alleged class of Defendants includes legal owners of lots, equitable owners of lots, and at least one developer—the second named Defendant. (A9) Respondents' Complaint failed to allege that the named Defendants adequately represent the alleged class.

Respondents' Complaint sought an injunction for the purpose of enforcing restrictive covenants providing as follows:

> "No trailer shall be allowed permanently on any tract. However, it is permissible for a trailer to be used while building a dwelling provided that in no instance shall the time exceed 18 months." (A15, A17)

These restrictions were placed on record as relating to the subdivision and additions thereto in 1954 and 1955. (A16, A18) The restrictions, by their terms, expire January 1, 1975. (A15, A17)

Petitioner filed a Motion to Dismiss the Complaint on the grounds, among others, that the Complaint does not

1. "(A)" refers to Appendix appended hereto.

properly state a class action as to the Petitioner and the other Defendants. (A19-A20) Petitioner's Motion to Dismiss was denied and, after Petitioner filed her Answer and Defenses and Counterclaim seeking to have the restrictive covenants declared null and void, the cause proceeded to a trial before the court. At the trial, the evidence revealed that the subdivision which was subject to the restrictive covenants includes the original subdivision and three separate additions thereto. There was no evidence adduced at the trial and no allegations by the Respondents in their Complaint as to the number of owners allegedly represented by the Respondents nor the number of owners allegedly represented by Petitioner and the other named Defendant. Neither does the record reflect the total number of persons owning land in the four tracts involved. At the same time, the record reflects that no process was served upon the other members of the alleged class of Defendants and no formal notice of the suit was given to such members.

At the close of the Respondents' case and at the close of all the evidence, counsel for Petitioner again raised the objection that the Respondents' action was not a proper class action. The trial court reserved ruling and requested the parties to submit legal memoranda. In its Memorandum Brief, the Petitioner addressed herself to the question of whether the Respondents' action was a valid class action and stated:

> "What the Plaintiffs [Respondents] are really asking the Court to do, beyond this Defendant and the other named Defendant, is to enter a mandatory injunction against a person, or persons, unknown, without the Constitutionally required notice to those persons, and without the right to be heard, affecting the property of those persons in a critical way." (A25)

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Thereafter, the trial court entered its Order holding that it had jurisdiction of the parties, including unnamed, unknown Defendants, and, further, holding that the restrictive covenants were valid and enforceable and requiring the Defendants (including Petitioner, the other named Defendant and other unknown and unnamed Defendants) to remove, within 90 days from the date of the Order, all trailers not in compliance with the restrictive covenant. (A3-A4)

Petitioner filed a Motion for Rehearing and stated as one of her grounds for rehearing:

> "That the Order entered herein is contrary to the Constitutions of the State of Florida and of the United States of America in that it purports to bind persons who had no notice of this action, without a chance to defend themselves, and without due process of law." (A27)

The Court denied Petitioner's Motion for Rehearing. (A5-A6)

Petitioner then filed her Notice of Appeal to the Second District Court of Appeal and included in her Assignments of Error the following assignment:

> "The trial court erred in entering its Order dated September 21, 1970, said Order being contrary to the Constitutions of the State of Florida and of the United States of America in that it purports to bind persons who had no notice of this action, without a chance to defend themselves, and without due process of law." (A28)

In the Brief of Appellant filed by Petitioner with the Second District Court of Appeal, Petitioner urged as one of her points on appeal that:

> "The trial court erred in entering an injunction against unknown Defendants without notice and without an opportunity to defend themselves." (A30)

The Constitutional infirmity of the trial court's Order was raised again by Petitioner in her Reply Brief filed with the Second District Court of Appeal and, subsequent to the per curiam affirmance entered by that Court, Petitioner again raised the Constitutional issue in her Petition for Rehearing. (A31-A33, A34-A36)

The Second District denied the Petition for Rehearing and Petitioner then filed with the Supreme Court of the State of Florida her Petition for Writ of Certiorari to the District Court of Appeal of Florida, Second District, in which Petitioner once more raised the question of the constitutionality of the trial court's injunction directed against unnamed, unknown Defendants without notice and without an opportunity to defend themselves. (A36-A37) Again, in her Brief in Support of her Petition for Writ of Certiorari, Petitioner once more raised this Constitutional question and, finally, subsequent to the Florida Supreme Court's denial of her Petition for Writ of Certiorari, Petitioner filed her Petition for Rehearing and again raised the due process question. (A38-A40, A41-A43) The Petition for Rehearing was denied. (A6-A7)

REASONS FOR GRANTING THE WRIT

The decisions of the Supreme Court of the State of Florida and of the Second District Court of Appeal upholding the trial court's mandatory injunction against all the members of the alleged class of Defendants deprive those members of due process of law and are not in accord with applicable decisions of this Court.

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The Respondents in the instant case have sued Petitioner and a developer allegedly as representatives of a class of Defendants which purportedly includes legal owners of lots, equitable owners of lots, lessees of lots and owners of trailers or mobile homes. The Respondents have neither alleged nor proved the number, or even approximate number, of such Defendants. The Respondents have neither alleged nor proved that the named Defendants adequately represent the other members of the alleged class. The Respondents have neither alleged nor proved that service of process has been obtained on the other members of the alleged class or that notice of the suit has been given to such members. Nevertheless, the trial court has entered its mandatory injunction against not only the named Defendants but also all unnamed and unknown Defendants who own trailers or mobile homes or own, rent or lease lots on which trailers or mobile homes are located. (A5-A6) The intermediate appellate court and the Supreme Court of the State of Florida have upheld the trial court's Order.

In the landmark case of *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115 (1940), this Court was faced with a similar situation. The question presented to this Court in *Hansberry* v. *Lee*, *supra*, was whether a decree entered in favor of certain plaintiffs as representatives of a class and upholding a restrictive agreement was binding upon alleged members of the class who were not parties to the litigation. The Supreme Court of Illinois had held that the non-party class members were bound by the prior determination. This Court, in reaching its decision, first stated (311 U.S. at 41-42):

> "The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so

> great that their joinder as parties in conformity to the usual rules of procedure is impracticable. . . In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree."

The decision of this Court makes clear that from the standpoint of due process of law a class suit can be binding upon non-parties *only* if the requirements of impracticability of joinder and adequate representation are met.

In *Hansberry* v. *Lee, supra,* the question of impracticability of joinder was not involved but the issue of adequate representation constituted the basic problem to which this Court addressed itself. This Court found that the proponents of the restrictive agreement had failed to prove that the parties in the prior litigation adequately represented all members of the alleged class. Because of the divergence of interests between the parties to the litigation and certain of the members of the alleged class, this Court held that due process precluded any binding effect on the rights of the absent parties.

In the instant case, not only is there a complete absence of proof of adequate representation but there is also a lack of proof of impracticability of joinder. Neither the pleadings nor the record in this case indicate whether the alleged class of Defendants is comprised of five persons, ten persons, one hundred persons or more, or less. Neither can we tell from the pleadings or the record whether the two named Defendants adequately represent the legal and equitable lot owners, the mobile home owners, and the lessees of lots, all of which purportedly consti-

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tute the class of Defendants and all of which have been enjoined by the trial court.

The doctrines of impracticability of joinder and adequate representation have become fundamental requirements of class actions as a result of the necessity of compliance with due process principles. In *International News Service* v. *Associated Press*, 248 U.S. 215, 39 S.Ct. 68 (1918), this Court recognized that in a proper class action each member of the class would be a proper party and, except for the number of such members, perhaps a necessary party. The fact of impracticability of joinder of many such members serves as initial justification for use of a class action. No class action, however, can have a binding effect on absent members of the class unless the interests of those members have been adequately represented by existing parties to the litigation. *Sam Fox Publishing Company* v. *United States*, 366 U.S. 683, 691, 81 S.Ct. 1309 (1961). If the absent members of the class could be bound regardless of adequate representation and regardless of notice, such absent members would necessarily be deprived of due process.

The requirement of impracticability of joinder and its relationship to due process notions has recently been recognized as follows:

> "It is generally agreed today that a class action should not be allowed if procedures more in keeping with traditional notions of due process are readily available. Actual joinder is always preferable when practicable. Impracticability of joinder, therefore, ought to be, and under modern rules is, a prerequisite to any kind of class action." *Homberger, State Class Actions and the Federal Rule*, 71 Col. L. Rev. 609, 614 (April, 1971)

The impracticability requirement has also been described as follows:

> "The raison d'etre of the class suit doctrine is necessity, which in turn depends upon the question of number. The question of what constitutes impracticability—when is a class so numerous as to make it impracticable to bring them all before the court—therefore remains." 3B Moore's Federal Practice, p. 23-271, ¶23.05.

In *Knowles* v. *War Damage Corporation*, 171 F.2d 15, 18 (D.C. Cir. 1949), the court, in discussing the requisites of a class action, remarked that it is "pertinent to consider . . . whether the number of parties is sufficient as compared to the numerical size of the class." In *Matthies* v. *Seymour Manufacturing Company*, 270 F.2d 365, 370 (2d Cir. 1969), the court stated:

> "One of the essential criteria governing the propriety of a class action, and one of the safeguards against its indiscriminate use to avoid joinder, is that the membership of the class be so numerous as to make it impracticable for the plaintiff to bring all before the court."

See also *Advertising Specialty National Association* v. *Federal Trade Commission*, 238 F.2d 108 (1st Cir. 1956).

In spite of the constitutionally based doctrine of impracticability of joinder and in spite of the very language of the Florida Rule of Civil Procedure authorizing class actions,[2] the Respondents in this case have utterly failed to demonstrate impracticability of joinder of the members of the alleged class of Defendants. The trial court had absolutely no evidence on which to base any determination as

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2. See Rule 1.220, Florida Rules of Civil Procedure, pp. 2-3, *supra*.

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to the impracticability of joinder. The record thus does not support the use of a class action and does not justify the consequent departure from the fundamental principle of due process which requires joinder of all parties to be bound by the court's judgment.

As noted above, in addition to the threshold requirement of impracticability of joinder, there must also be a showing of adequate representation.[3] In *Kentucky Home Mutual Life Insurance Company* v. *Duling*, 190 F.2d 797, 802 (6th Cir. 1951), the court stated:

> "Unless it can be said that the interests of the absent parties are fairly protected by those who seek to represent them, such class procedure lacks the necessary quality of due process."

Similarly in *Carroll* v. *American Federation of Musicians of the United States and Canada*, 372 F.2d 155, 162 (2d Cir. 1967), the court noted:

> "In a true class action, all of the members of the class, including those absent, are bound by the judgment. . . Therefore, the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members."

Also, in *Dierks* v. *Thompson*, 414 F.2d 453, 456 (1st Cir. 1969), the court stated:

> "In order to maintain a class suit plaintiffs must be truly representational. . . Unless the relief sought by

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3. See 3B Moore's Federal Practice, p. 23-452-453, ¶23.07[4] where it is stated:
> "While the court may and should consider the number appearing on the record, as contrasted with the number in the class the safest rule seems, again, to be that there must be a showing of representation that will satisfy the court that the interests of the absentee members will be adequately protected by the representative, plaintiff or defendant."

> the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs."

The Circuit Court of Appeals for the District of Columbia, in *Knowles* v. *War Damage Corporation*, 171 F.2d 15, 18 (D.C. Cir. 1949), has recognized the burden of proof placed upon a party or parties seeking to bind a class as follows:

> "There must be a showing of adequate representation of the class, for members of that class are to be bound by the outcome of the action."

In the instant case, the Respondents have not attempted to show that the two named Defendants adequately represent the other members of the alleged class. One of the named Defendants is a developer and the other lives in a trailer in the subdivision and is equitable owner of a lot on which she rents spaces to the owners of two trailers. The Respondents have produced no evidence to show that these two named Defendants are in a position adequately to represent the interests of other members of the alleged class. Aside from the fact that the record gives no idea of the number of other such members, the record also fails to establish whether the other members own large trailer parks, own single trailers, or own single lots on which single trailers might be located. It is clear that the developer-Defendant is not typical of other members of the alleged class but there is no way to tell whether the other named Defendant is "typical." From the very outset of this litigation, and at every opportunity since then, the Petitioner has vigorously challenged the propriety of suing the named Defendants as representatives of an al-

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leged class of, and thus attempting to bind, other unknown and unnamed and unidentified Defendants. Nevertheless, even though there has been no showing of adequate representation and obviously no finding of adequate representation by the trial court, the court has entered its mandatory injunction directed against all members of the alleged class.

Although adequate representation appears to obviate the necessity of notice to absent members of an alleged class, as the danger of inadequate representation increases, the importance of notice does likewise. Notice is particularly significant when the alleged class is sued, rather than suing, and when the members of the alleged class are not already voluntarily joined together in some form of association. See *Note, Binding Effect of Class Actions,* 67 Harv. L. Rev. 1059, 1063 (1954). Some courts have held that notice is required as a matter of due process in all representative actions. See *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 564 (2d Cir. 1968); cf. *Gart* v. *Cole,* 263 F.2d 244, 249 (2d Cir. 1959). This rule may be qualified, however, if adequate representation exists and is proved. See *Northern Natural Gas Company* v. *Grounds,* 292 F. Supp. 619, 636 (D. Kan. 1968). In any event, whether adequate representation is sufficient without notice or whether adequate representation and notice are required, in the instant case there is a glaring absence of both notice and adequate representation. Under these circumstances, the decisions are unanimous that no order entered in a class action may be binding upon absent parties.

CONCLUSION

The use of class actions in state courts and in federal courts is proliferating remarkably. Class actions are exceedingly useful and beneficial implements for the determination and enforcement of legal rights and remedies. At the same time, however, because class actions by their very nature are in derogation of traditional concepts of due process, courts must be scrupulously cautious in sanctioning the use of this device. We respectfully submit that, in the instant case, the use of the class action has gone beyond the limits of constitutional due process.

We earnestly urge this Court to issue its Writ of Certiorari to the Supreme Court of Florida for the purpose of reaffirming the previous decisions of this Court and of lower federal courts holding that impracticability of joinder and adequate representation are essential in class actions. Due process requires no less.

For these reasons, a Writ of Certiorari should issue to review the action and Order of the Supreme Court of Florida herein.

Respectfully submitted,

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Attorneys for Petitioner

EDWARD M. WALLER, JR.

By: .....
EDWARD M. WALLER, JR.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1972

TUESDAY, APRIL 25, 1972

CASE NO. 41,884

SUSAN MARAMAN,
Petitioner,

vs.

GRADY HARDISTER, ET AL.,
Respondents.

DISTRICT COURT OF APPEAL,
SECOND DISTRICT

ORDER

(Filed June 6, 1972)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., ERVIN, BOYD, McCAIN and DEKLE, JJ., concur

CC:
Hon. C. L. Dillahunty, Clerk
Hon. James F. Taylor, Clerk,
Fowler, White, Gillen, Humkey, Kinney and Boggs
(Hon. Edward M. Waller, Jr.)
Griffin, Gillis & Stead
(Hon. John P. Griffin)

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JULY TERM, A. D. 1971

Case No. 71-23

SUSAN MARAMAN,
Appellant,

v.

GRADY HARDISTER, et al.,
Appellees.

PER CURIAM AFFIRMANCE

Opinion filed September 24, 1971.

Appeal from the Circuit Court for Hillsborough County; Woodie A. Liles, Judge.

Edward Waller of Fowler, White, Gillen, Humkey, Kinney and Boggs, Tampa, for Appellant.

Jack Griffin of Griffin, Gillis, & Stead, Tampa, for Appellees.

PER CURIAM.

Affirmed.

MANN, A.C.J., and McNULTY, J., and DURRANCE, CARL, ASSOCIATE JUDGE, CONCUR.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

No. 182733, DIVISION H

GRADY HARDISTER, DOTEN K. WARNER, LLOYD NEWCITY, JERRY M. BOWMER, ROBERT A. BOWMER, HENRY KRISTOF, FRED G. STEAD, FRED MOSGELLER, G. F. PENNINGTON, OMAR C. MILLER, CARNEY W. ADAMS, NELSON E. CLIFFORD, JAMES C. CANTRELL, LAWRENCE D. SMITH, and PETER HORVANSKY,

Plaintiffs,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMAN, and Other Parties unknown,

Defendants.

ORDER

(Filed September 22, 1970)

THIS CAUSE coming on for trial on the pleadings filed, evidence admitted by counsel for the parties, testimony of witnesses, memorandum briefs submitted by counsel, and the Court being fully advised in the premises, the Court finds as follows:

(a) That the Court has jurisdiction of the parties and the subject matter of this cause.

(b) That the restrictive covenants on Wonderland Acres Subdivision, Hillsborough County, Florida, and the 1st, 2nd and 3rd Additions, thereto, are valid and enforceable.

(c) That the equities of this cause are with the plaintiffs and against the defendants.

IT IS THEREFORE,
ORDERED AND ADJUDGED, that

1. All trailers or mobile homes within Wonderland Acres Subdivision, Hillsborough County, Florida, and its 1st, 2nd and 3rd Additions, not being used on a temporary basis during the construction of a permanent dwelling, in conformity with recorded restrictive covenants regarding trailers and mobile homes, are to be removed by the defendants from the said Wonderland Acres Subdivision and its additions, within ninety (90) days of the entry of this Order.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida, this 21st day of Sept., 1970.

/s/ Woodie A. Liles
Circuit Judge

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY.

CIVIL ACTION

Case No. 182733, Division H
GRADY HARDISTER, ET AL.,
Plaintiff,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMON, and other parties unknown,
Defendants.

ORDER ON MOTIONS

(Filed December 14, 1970)

This cause having come on the 8th day of November, 1970 to be heard upon all pending motions, and due notice having been given, and counsel for Plaintiff having announced that Plaintiff was withdrawing Plaintiff's Motion to Dismiss, and the Court having heard argument of counsel on all other pending motions, it is thereupon, and in consideration thereof,

ORDERED AND ADJUDGED, as follows:

1. That the Order heretofore entered in this cause on September 21, 1970 be, and the same is hereby, amended by deleting paragraph 1, thereof, and substituting the following therefor:

> "1. All trailers or mobile homes owned by the Defendants within Wonderland Acres Subdivision, Hillsborough County, Florida, and its first, second, third additions, and all trailers located upon lands owned, rented or leased by the Defendants located

within said subdivision and its additions, not being used on a temporary basis during the construction of a permanent dwelling, in conformity with recorded restrictive covenants regarding trailers and mobile homes, are to be removed by the Defendants from the said Wonderland Acres Subdivision, and its additions, within ninety (90) days of December 11th, 1970."

2. That, through the foregoing amendment, Defendant's Motion to Amend Order is hereby granted.

3. That Motion for Rehearing of Defendant Susan Maramon, be, and the same is hereby, denied.

DONE AND ORDERED, in Chambers in the Hillsborough County Courthouse, in the City of Tampa, Hillsborough County, Florida this 11th day of December, 1970.

/s/ Woodie A. Liles
Circuit Judge

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1972
FRIDAY, JUNE 2, 1972

Case No. 41,884

SUSAN MARAMAN,
Petitioner,

vs.

GRADY HARDISTER, et al.,
Respondents.

ORDER

(Filed June 6, 1972)

On consideration of the Petition for Rehearing filed by attorneys for Petitioner,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

ROBERTS, C.J., ERVIN, BOYD, McCAIN and DEKLE, JJ., Concur

cc: Hon. C. L. Dillahunty, Clerk
Hon. James F. Taylor, Clerk
Hon. Edward M. Waller, Jr.
Hon. John P. Griffin

A True Copy
TEST:
Sid J. White
Clerk Supreme Court
By /s/ Dave Lang, Jr.
Chief Deputy Clerk
Supreme Court of Florida

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, ORDER OF APRIL 25, 1972.)

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

No. 182733

GRADY HARDISTER, DOTEN K. WARNER, LLOYD NEWCITY, JERRY M. BOWMER, ROBERT A. BOWMER, HENRY KRISTOF, FRED G. STEAD, FRED MOSGELLER, G. F. PENNINGTON, OMAR C. MILLER, CARNEY W. ADAMS, NELSON E. CLIFFORD, JAMES C. CANTRELL, LAWRENCE D. SMITH, and PETER HORVANSKY,
Plaintiffs,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMON, and Other Parties unknown,
Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

(Filed November 3, 1969)

Come now the Plaintiffs Grady Hardister, et al, individually by and through their undersigned attorney, and pursuant to Rule 1.220 of the Florida Rules of Civil Procedure, on behalf of all other landowners of W. E. Hamner's Wonderland Acres, 1st, 2nd and 3rd Additions, Hillsborough County, Florida, similarly situated as Plaintiffs, and sue the Defendants, Golfland Developers, Inc., a Florida Corporation, and Susan Maramon, individually, and as representative of other parties at this time unknown to the Plaintiffs, as a class of Defendants similarly situated as the individual Defendants, Golfland Developers, Inc. and Susan Maramon, and say:

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COUNT 1.

1. This is an action for injunctive relief against the Defendants individually, and as a class those parties who are similarly situated as the said Defendants, for violation of restrictive covenants recorded in Book 1807, Page 245 of the official records of Hillsborough County, Florida, attached to real property known as W. E. Hamner's Wonderland Acres, 1st Addition, of Hillsborough County, Florida, and restrictive covenants recorded in Book 1895, Page 160 of the official records of Hillsborough County, Florida, attached to real property known as W. E. Hamner's Wonderland Acres, 2nd and 3rd Additions, of Hillsborough County, Florida.

2. The Plaintiffs are owners of certain lots within the platted boundaries of the said W. E. Hamner's Wonderland Acres, 1st, 2nd, or 3rd Additions and are united by a common tie of ownership of said land, and a community of interest in the decision of the same questions of law and fact involved in this cause, and Plaintiffs and the Defendants are so numerous, and the potential legal actions involved herein are so numerous, that their prosecution would visit great inconvenience, hardship and exposure upon the Plaintiffs if they were to be prosecuted individually, that the Plaintiffs bring this cause on as a class action for all those owners of land within the said W. E. Hamner's Wonderland Acres, 1st, 2nd and 3rd Additions, who are similarly situated, and who are similarly aggrieved by the actions of the Defendants in violating certain restrictive covenants which attach to all land within the boundaries of the said W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions.

3. The Defendants are the legal owners of, or parties who have equitable interests in, certain lots within the

platted boundaries of the said W. E. Hamner's Wonderlands Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida.

4. On June 9, 1954 the Defendant, Golfland Developers, Inc., a Florida corporation, recorded with the Clerk of the Circuit Court in and for Hillsborough County, Florida, a Statement of Restrictions to apply to that land lying in Hillsborough County, Florida, and more particularly described as W. E. Hamner's Wonderland Acres, 1st Addition, a copy of which restrictions is attached hereto as Plaintiffs' Exhibit A.

5. On April 12, 1955, the Defendant Golfland Developers, Inc., a Florida corporation, recorded with the Clerk of the Circuit Court in and for Hillsborough County, Florida, a Statement of Restrictions to apply to that land lying in Hillsborough County, Florida and more particularly described as W. E. Hamner's Wonderland Acres, 2nd and 3rd Additions, a copy of which restrictions is attached hereto as Plaintiffs' Exhibit B.

6. Since June 9, 1954, the Defendants have placed on, or caused to be placed on, certain lots of said W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, mobile homes or trailers, for the purpose of rental, for sale as residences, and for use as residences, in direct violation of the restrictive covenants attaching to said lots or parcels of land evidenced by Plaintiffs' Exhibits A and B.

7. To allow such violations to continue will cause irreparable injury to the Plaintiffs in the form of diminution of the value of Plaintiffs' real property, as well as irreparable damage to the Plaintiffs, not susceptible of complete pecuniary compensation, in the form of loss of

use and enjoyment of Plaintiffs' real property, and that the Plaintiffs have no adequate remedy at law for said violations.

WHEREFORE, the Plaintiffs demand (a) an injunction to restrain the Defendants, their servants, agents, employees and assigns, both known and unknown, from continuing to rent, sell, or use as residences the mobile homes or trailers presently existing on certain lots or parcels of land of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida; and (b) an injunction to restrain the Defendants, their servants, agents, employees and assigns, both known and unknown, from the placing of any further trailers or mobile homes on any parcels of land within the boundaries of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, except those mobile homes and trailers meeting the requirements of the restrictive covenants evidenced by Plaintiffs' Exhibits A and B; and (c) removal, within eighteen (18) months of the issuance of an injunction by this court, of all mobile homes or trailers presently on any lots or parcels of land within the boundaries of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida.

COUNT 2.

For a second count against the Defendants, the Plaintiffs say:

8. Plaintiffs repeat the allegations contained in Paragraphs 1 through 6, with the same effect as if herein set forth.

9. Prior to the institution of this injunctive suit, and at the present time, the Defendant, Golfland Developers, Inc., a Florida corporation, has sold and is presently selling

certain lands within the boundaries of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida, on Contracts for Deeds or other legal instruments, whereby through said legal instruments legal title to said land is retained by the said Golfland Developers, Inc. while equitable title resides in the purchasers of said land. That Golfland Developers, Inc. sells the land with full knowledge that said land is to be used for establishment of permanent or temporary mobile homes or trailer homes for use as rental units or residences in violation of restrictions against such usage as evidenced by Plaintiffs' Exhibits A and B. That as legal title holder of said lands, Golfland Developers, Inc. can prevent the placing of mobile homes or trailers on said parcels of land, but that Golfland Developers, Inc. has allowed the equitable title holders of said lands to place mobile homes or trailers thereon in violation of the said restrictions, all to the detriment of the value, use and enjoyment of the lands owned by the Plaintiffs, and others being similarly located in W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions. That unless restrained from allowing such violation of the said restrictions, Golfland Developers, Inc. will continue to allow the equitable title holders to violate the aforesaid restrictions. That unless an injunction is issued against the Defendants, Golfland Developers, Inc., the Plaintiffs will suffer irreparable damage in the form of diminution of the value of their real property as well as the diminution of the use and enjoyment of said real property.

WHEREFORE the Plaintiffs demand a mandatory injunction requiring the Defendant, Golfland Developers, Inc., to prevent any mobile homes or trailers from being placed on any lands within the boundaries of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, upon

which the said Golfland Developers, Inc. retain legal title or over which Golfland Developers, Inc. exercise control.

COUNT 3.

For a third count against the Defendants, the Plaintiffs say:

10. Plaintiffs repeat the allegations contained in Paragraphs 1 through 6 with the same effect as if herein set forth.

11. That other parties, known and unknown to the Plaintiffs, being of the class of Defendants herein, contemplate the placing of trailers or mobile homes on land within the boundary of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida, in violation of the aforesaid restrictive covenants, and the Plaintiffs are in apprehension of immediate injury in the form of diminution of property values and diminution of use and enjoyment of their real property, if said mobile homes or trailers are allowed to be placed on said lands; and the apprehension of said injury will be continuing unless restrained by the court in accordance with the restrictions enumerated in Plaintiffs' Exhibits A and B.

WHEREFORE, Plaintiffs demand an injunction to restrain the named and unnamed Defendants, other defendants known or unknown to the Plaintiffs, and any other party having legal or equitable interest in lands within the boundaries of W. E. Hamner's Wonderland Acres, 1st, 2nd, and 3rd Additions, Hillsborough County, Florida, from the placing of any trailer or mobile home on lands within the boundaries of said subdivision until Jannary 1,

1975, all according to the recorded restrictions on said lands evidenced by Plaintiffs' Exhibits A and B.

/s/ John P. Griffin
John P. Griffin, Esquire
Suite 802, IBM Building
100 West Kennedy Blvd.
Tampa, Florida
Attorney for Plaintiffs

STATE OF FLORIDA :
COUNTY OF HILLSBOROUGH :

BEFORE ME, the undersigned authority, personally appeared JOHN P. GRIFFIN, who after being first duly sworn, deposes and says that he has read the foregoing COMPLAINT FOR INJUNCTIVE RELIEF and that the statements contained therein are true and correct to the best of his knowledge.

/s/ John P. Griffin
John P. Griffin

Sworn to and subscribed before me this 3rd day of November, 1969.

/s/ Peggy H. Bowman
Notary Public
State of Florida at Large

My Commission Expires: May 22, 1970.

Exhibit A

May 24, 1954
Tampa, Florida

BOOK 1807 PAGE 245

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

KNOW ALL MEN BY THESE PRESENTS: That whereas the undersigned are the owners of the following property located in Hillsborough County, Florida, TO WIT: All of W.E. HAGGER'S WONDERLAND ACRES, as same as recorded in Plat Book 31, Page 82 of the Public Records of Hillsborough County, Florida, and all of W.E. HAGGER'S WONDERLAND ACRES, 1ST ADDITION, same as recorded in Plat Book 31, Page 83, of the Public Records of Hillsborough County, Florida.

THEREFORE, THESE PRESENTS WITNESSETH: That the parties of this agreement, for and in consideration of the mutual covenants herein contained, and the further consideration of One Dollar in hand paid by each party to the other, receipt whereof is hereby acknowledged, and for other good and valuable considerations, do herein and hereby covenant and agree one with the other, for ourselves, our heirs, successors, assigns, and legal representatives, that as to said property above described, the following restrictions are hereby placed upon our respective holdings as come within the boundaries above described:

These restrictions shall run until January 1, 1975.

No dwelling shall be permitted on any tract unless the ground floor area of the main structure contains not less than 600 square feet.

The outside of any building erected on any tract must be painted within four weeks after the roof has been completed.

No trailer shall be allowed permanently on any tract. However, it is permissible for a trailer to be used while building a dwelling provided that in no instance shall the time exceed eighteen months.

No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may become an annoyance or nuisance to the neighborhood.

If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the Covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such Covenants and either to prevent him or them from so doing or to recover damages or other dues for such violation.

Invalidation of any one of these Covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed in its name by its president, and its corporate seal to be affixed, attested by its SECRETARY the day and year above written.

(CORPORATE SEAL)

GOLFLAND DEVELOPERS, INC.

STATE OF Florida 1807 PAGE 246

COUNTY OF Hillsborough

I HEREBY CERTIFY, That on this 24th day of May A.D.,1954 before me personally appeared J.B. Kenner Miller and W.E. Kenner, respectively President and Secretary of GOLFLAND DEVELOPERS, INC., a corporation under the laws of the State of Florida, to me known to be the persons described in and who executed the foregoing instrument and severally acknowledged the execution thereof to be their free act and deed as such officers, for the uses and purposes therein mentioned; and that they affixed thereto the official seal of said corporation, and the said instrument is the act and deed of said corporation.

WITNESS my signature and official seal at Tampa in the County of Hillsborough and State of Florida the day and year last aforesaid.

(SEAL)

Notary Public, State of Florida
My commission expires Sept. 7
Bonded by Adam Bradley & Co.

FILED & RECORDED
FOR RECORD
MAY 11 12 24
245

Book 1895 Page 189

August 11, 1955
Tampa, Florida

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

KNOW ALL MEN BY THESE PRESENTS: That thereas the undersigned are the owners of the following property located in Hillsborough County, Florida, TO WIT: All of U.S. HIGHWAY NO. 41 ACRES AND ADDITION, as same is recorded in Plat Book 37, Page 32 of the Public Records of Hillsborough County, Florida, and all of A. B. Hutton's HOMELAND ACRES, AND ADDITION, same as recorded in Plat Book 32, Page 69, of the Public Records of Hillsborough County, Florida.

NOW THEREFORE, THESE PRESENTS WITNESSETH: That the said party of the first part, for and in consideration of the mutual covenants and agreements hereinafter set forth, and in consideration of ONE DOLLAR to hand paid by each party to the other, receipt whereof is hereby acknowledged and for other good and valuable considerations, do herein and hereby covenant and agree one with the other, for themselves, their heirs, successors, assigns, and legal representatives, that as to said property above described, the following restrictions are hereby placed upon and accepted as covenants which the breaches above described:

These restrictions shall run until January 1, 1975.

No dwelling shall be permitted on any tract unless the ground floor area of the main structure contains not less than 900 square feet.

The outside of any building erected on any tract must be painted within four weeks after the roof has been completed.

No trailer shall be allowed permanently on any tract. However, it is permissible for a trailer to be used while building a dwelling provided that in no instance shall the time exceed eighteen months.

No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may become an annoyance or nuisance to the neighborhood.

If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in said development or subdivision to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such covenants and either to prevent him or them from so doing or to recover damages or other dues for such violation.

Invalidation of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.

IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed in its name by its president, and its corporate seal to be affixed, attested by its SECRETARY the day and year above written.

(CORPORATE SEAL)

ATTEST: W. R. Hammon
Secretary

GULF COAST INVESTMENT CO., INC.

J. M. Hammon
President

Filed in office this 2nd day of June 1970

BOOK 1895 PAGE 161

STATE OF Florida

COUNTY OF Hillsborough

I HEREBY CERTIFY, that on this 11th day of August A.D., 1955 before me personally appeared [illegible], and [illegible], respectively President and Secretary of [illegible], a corporation under the laws of the State of Florida, to me known to be the persons described in and who executed the foregoing instrument and severally acknowledged the execution thereof to be their free act and deed as such officers, for the uses and purposes therein mentioned; and that they affixed thereto the official seal of said corporation, and the said instrument is the act and deed of said corporation.

WITNESS my signature and official seal at [illegible] in the County of [illegible] and State of [illegible] the day and year last aforesaid.

[illegible] (Seal)

Notary Public, State of Florida at Large
My commission expires Feb. 28, 1958
Bonded by Home Bonding & Insurance Co.

State of Florida, County of Hillsborough
FILED FOR RECORD
AUG 12 1955 AT 9:46
IN Deed BOOK 1895
PAGE 160 AND RECORDED
CHAS. H. PENT
CLERK CIRCUIT COURT
DEPUTY CLERK

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH)

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE IN MY OFFICE. WITNESS MY HAND AND OFFICIAL SEAL THIS 12 DAY OF August 19 55.

JAMES F. TAYLOR, JR., CLERK

By Helen M. Tannuzzo

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION
No. 182733, Division H

GRADY HARDISTER, ET AL.,
Plaintiff,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMON, and other parties unknown,
Defendants.

MOTION TO DISMISS

(Filed November 21, 1969)

COMES NOW the Defendant, SUSAN MARAMON, by and through her undersigned attorneys and moves the Court to dismiss the Complaint of the plaintiffs upon the following grounds, jointly and severally:

1. The Complaint fails to state a cause of action upon which any relief may be granted herein.

2. The Complaint contains merely conclusions on the part of the pleader as to facts or law or both.

3. The questions of law and subject matter of this litigation is not proper for a class action within the scope of Rule 1.220 of the Florida Rules of Civil Procedure.

4. The Plaintiffs herein are not members of any class within the meaning of Rule 1.220 of the Florida Rules of Civil Procedure.

5. The Defendants herein do not comprise a class or belong to any class within the meaning of Rule 1.220 of the Florida Rules of Civil Procedure.

Fowler, White, Collins, Gillen,
Humkey & Trenam
P.O. Box 1438, Tampa, Florida 33601
By: /s/ Billy R. Barr
Billy R. Barr

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss has been furnished, by mail, to John P. Griffin, 100 W. Kennedy Boulevard, Tampa, Florida, This 20 day of November, 1969.

/s/ Billy R. Barr
Attorney

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

No. 182733, DIVISION H

GRADY HARDISTER, DOTEN K. WARNER, LLOYD NEWCITY, JERRY M. BOWMER, ROBERT A. BOWMER, HENRY KRISTOF, FRED G. STEAD, FRED MOSGELLER, G. F. PENNINGTON, OMAR C. MILLER, CARNEY W. ADAMS, NELSON E. CLIFFORD, JAMES C. CANTRELL, LAWRENCE D. SMITH, and PETER HORVANSKY,

Plaintiffs,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMAN, and Other Parties unknown,

Defendants.

MEMORANDUM BRIEF OF DEFENDANT SUSAN MARAMAN

(Filed August 12, 1970)

STATEMENT OF THE FACTS

Plaintiffs brought this action, allegedly as a class, to enjoin the named Defendants and others similarly situated, allegedly as a class, to enjoin certain violations of restrictions on subdivided property in Hillsborough County, Florida. This Defendant Answered, denying any violations, denying all of Plaintiffs' allegations relating to Defendants as a class and pleading defensively that changing conditions rendered the restriction in question unenforceable.

The Defendant Maraman also Counter claimed against the Plaintiffs for removal of the restrictions as to her

particular lot. This Defendant's Counter claim was against the Plaintiffs as a "class" within the purview of Rule 1.220 of the Florida Rules of Civil Procedure. All essential allegations in this regard were made by this Defendant and admitted by Plaintiffs.

The restriction in question prohibited placing of trailers on the lots in question except by the owners thereof, and then only for a maximum period of 18 months during construction of the owner's permanent residence.

There is really a remarkable lack of conflict in the testimony adduced for both sides, and the Exhibits, particularly joint Exhibits 4, 5 and 6, show better than any words the conditions that existed at the time this law suit was filed. The subdivision was plotted, and the restrictions imposed, in 1954. During the next half dozen years, development was slow, but there have apparently always been at least as many trailers as houses in the subdivision. During the past decade, development has accelerated, with trailers now outnumbering houses. There was uncontradicted testimony that there had been trailers on some lots, continuously, for as long as ten years; on a good many for five years, and on a large number for more than two years.

The Defendant Maraman admitted that she had two trailers on her land, that both were rented, and that she had no present intention to build on the land. She stated that she had placed the trailers on her lot, although she was chargeable with notice of the restrictions, because "there were trailers all around me", and in reliance on the fact of numerous, obvious, unabated violations of the restrictions.

There was testimony from certain of the Plaintiffs that they had spoken to certain County Commissioners of Hillsborough County and to the Director of that County's

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Planning and Zoning Department about the violations within the last year or so, but that "nothing had been done". Plaintiffs never bothered to contact any of the owners of the offending trailers, or to take any action, other than this law suit, over the years and years of continuing violations.

It should be noted that one of the Plaintiffs, Jerry M. Bowmer, even admitted to having violated the restrictions by having rented a trailer on lands in the subdivision not owned by him, and living in it for a considerable length of time until he bought a lot and built on it.

It should also be noted that Plaintiffs adduced no evidence whatsoever bearing on the issue, clearly raised by the pleadings, on the validity of their "class action", either as to the Plaintiffs as a class or the Defendants as a class. On the other hand, the validity of this Defendant's counter claim against the Plaintiffs as representative members of a class was admitted.

POINTS INVOLVED

1. IS THE PLAINTIFF'S ACTION A VALID "CLASS ACTION"?
2. HAVE CHANGED CONDITIONS WITHIN THE SUBDIVISON RENDERED THE RESTRICTION UNENFORCEABLE?
3. HAS LACHES ON THE PART OF PLAINTIFFS BARRED THEIR RIGHT TO THE RELIEF SOUGHT?

ARGUMENT

1. IS THE PLAINTIFF'S ACTION A VALID "CLASS ACTION"?

This Defendant does not argue with the exposition of Rule 1.220 of the Florida Rules of Civil Procedure set out in Plaintiffs' Brief. There was in Plaintiffs' case, however, a complete lack of any shred of any proof of any of the requisite factors to a valid class action, as follows:

A. No showing that the question was one of common or general interest.

B. No showing that the Defendants represented a class that was too numerous to bring before the Court, or so large as to make it impracticable to bring them all before the Court. This is particularly vital inasmuch as Plaintiffs are asking for mandatory injunctions against persons who may very well not even be aware of the pendency of the pending litigation.

It is quite true that the cases of *Wallace* v. *Adams*, 51 L.Ed. 547, 275 Ct. 363, and *Port Royal, Inc.* v. *Conboy*, (1963) 154 So. 2d 734, approve the vehicle of the class action, but unlike those cases, there are no facts before the Court to warrant such approval in the case at bar. Furthermore, no showing was made that this Defendant and the sole other Defendant were members of a class, were representative of that class, or even, in fact, what that class was, nor was there any showing of the size of that class.

See *Lakeland* v. *Chase Nat. Co.*, (1947) 159 Fla. 783, 32 So. 2d 833; and *Osceola Groves* v. *Wiley*, (1955) 78 So. 2d 700 holding that one who endeavors to bring a class suit must not only plead, *but prove*, with a fair degree of certainty, beyond the bare language of the rule, what the

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class is and that such class is so numerous as to make it impracticable to bring them all before the Court.

What the Plaintiffs are really asking the Court to do, beyond this Defendant and the other named Defendant, is to enter a mandatory injunction against a person, or persons, unknown, without the Constitutionally required notice to those persons, and without the right to be heard, affecting the property of those persons in a critical way. In addition, Plaintiffs are asking the Court to delegate enforcements of such order to non-elected County officials, who would be powerless to do so despite the Court's order. The Plaintiffs are apparently asking the Court, in addition, to speculate as to whether or not this Defendant and the other named Defendant are "representatives" of those unknown persons, but Plaintiffs have not presented one scrap of evidence upon which the Court could base such speculation. This Defendant has not been able to find a single case, nor have Plaintiffs cited one, in which such an extraordinary "class action" has been approved by any appellate court.

2. HAVE CHANGED CONDITIONS WITHIN THE SUBDIVISION RENDERED THE RESTRICTION UNENFORCEABLE?

The Florida Courts have recognized repeatedly the doctrine that a radical change in conditions as to lands which are the subject of restrictions, such as repeated, unabated violations thereof throughout the subdivision involved, renders such restrictions nugatory and unenforceable, and justifies their removal by a court of equity. *Wharendorff* v. *Moore,* (1957) 93 So. 2d 720; *Allen* v. *Avondale,* (1938) 135 Fla. 6, 185 So. 137; see also 8 Fla. Jur., Covenants and Restrictions, §40 and *Dade County* v. *Thompson,* 146 Fla. 66, 200 So. 212. In the *Thompson*

case, supra, it was held, in substance, that to justify the removal of restrictions, such as those in the case at bar, it must be alleged and proved that conditions and circumstances existing at the time the restrictions were placed on the land have changed to the extent that the effect of the restrictions has been brought to nought. The prescribed test to be applied is whether or not the original intent of the parties to the restrictive covenants can be reasonably carried out or whether the changed conditions are such as to make ineffective . . .

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION
No. 182733, Division: H

GRADY HARDISTER, ET AL.,
Plaintiffs,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMON, and other parties unknown,
Defendants.

MOTION FOR REHEARING

(Filed September 25, 1970)

The Defendant SUSAN MARAMON, by and through her undersigned attorneys, respectfully moves this Honorable Court for a rehearing in the above and as grounds therefore says:

1. The Order entered herein on September 21, 1970 is contrary to the facts in evidence.

2. The Order entered herein on September 21, 1970 is contrary to the law.

3. That the Order entered herein is contrary to the Constitutions of the State of Florida and of the United States of America in that it purports to bind persons who had no notice of this action, without a chance to defend themselves, and without due process of law.

4. That the Order entered herein on September 21, 1970 is contrary to the statement of the Trial Judge herein at the hearing held on this Defendant's Motion to Dismiss wherein the Court indicated that it would not enter an order binding unknown defendants who were not specifically made parties hereto and given notice hereof.

WHEREFORE, it is respectfully prayed that the relief sought herein be granted.

Fowler, White, Gillen, Humkey
& Kinney, P.A.
P.O. Box 1438
Tampa, Florida 33601
Attorneys for Defendant
Susan Maramon
By: /s/ Ernest Keene Bard
Ernest Keene Bard

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by mail this 25th day of September, 1970 to John P. Griffin, 100 W. Kennedy Boulevard, Tampa, Florida.

/s/ Ernest Keene Bard
Attorney

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

CIVIL ACTION

Case No. 182733, DIVISION—H

GRADY HARDISTER, et al.,
Plaintiffs,

vs.

GOLFLAND DEVELOPERS, INC., a Florida corporation, SUSAN MARAMAN, and other parties unknown,
Defendants.

ASSIGNMENTS OF ERROR

(Filed January 18, 1971)

COMES NOW the Defendant, SUSAN MARAMAN, and assigns as error on appeal the following:

1. The trial court erred in entering its Order dated September 21, 1970.

2. The trial court erred in its Order dated December 11, 1970, in denying the Motion for Rehearing of Defendant SUSAN MARAMAN.

3. The trial court erred in entering its Order dated September 21, 1970, said Order being contrary to the facts and contrary to the law.

4. The trial court erred in entering its Order dated September 21, 1970, said Order being contrary to the constitutions of the State of Florida and of the United States of America in that it purports to bind persons who had no notice of this action, without a chance to defend themselves, and without due process of law.

5. The trial court erred in its Order of September 21, 1970, in holding that the restrictive covenants on Wonderland Acres Subdivision are valid and enforceable.

6. The trial court erred in its Order of September 21, 1970, in holding that the equities of this cause are with the Plaintiffs and against the Defendants.

7. The trial court erred in its Order of September 21, 1970, and in its Order of December 11, 1970, in orderig that the trailers or mobile homes described in said Orders are to be removed from the said Wonderland Acres Subdivision.

8. The trial court erred in denying the Motion to Dismiss filed by this Defendant.

9. The trial court erred in its Order of September 21, 1970, in holding that it had jurisdiction of all the parties purportedly bound by its Order.

Fowler, White, Gillen, Humkey
& Kinney, P.A.
Post Office Box 1438
Tampa, Florida 33601
Attorneys for Defendant
Susan Maraman
By: /s/ Edward M. Waller, Jr.
Edward M. Waller, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Assignments of Error has been sent by mail this 18th day of January, 1971, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida, Attorney for Plaintiff.

/s/ Edward M. Waller, Jr.
Edward M. Waller, Jr.

EXCERPT FROM BRIEF OF APPELLANT

(Filed March 30, 1971)

. . . of these facts, the Appellees themselves have allowed the restrictive covenant to die a natural death. It should now be too late for the Appellees to attempt resuscitation.

It is also significant to note that by their own terms the restrictive covenants placed upon the instant subdivision run only until January 1, 1975. (R 7, 9). Therefore, any benefit the Appellees would now derive from enforcement of the restrictive covenant would last for a relatively short period of time. If we balance this small benefit against the hardship imposed upon the Appellants and if we apply the balancing of conveniences principle, we are compelled to conclude that the restrictive covenant is no longer valid and should not be enforced. The holding of the trial court below that the equities are with the Appellees is simply not borne out by the facts.

III

THE TRIAL COURT ERRED IN ENTERING AN INJUNCTION AGAINST UNKNOWN DEFENDANTS WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO DEFEND THEMSELVES.

The Order of the trial court as it applies to unnamed Appellants without notice of the Appellees' suit is flagrantly unconstitutional. When it is claimed that parties as a class are bound by an Order entered against their representative, it must appear clearly that those parties have been really afforded such notice and opportunity to be heard as are requisite to due proces. *Battles* v. *Braniff Airways*, 146 F.2d 336, 339 (5th Cir. 1945) In the instant case, there is no evidence whatsoever that the members of

the class of unnamed Appellants received any notice of the pendency of the Appellees' suit. The injunctive order of the trial court directed against such Appellants is thus overly broad and clearly in violation of the due process clauses of the Florida and United States Constitutions.

CONCLUSION

The Complaint for injunctive relief brought by the Appellees in the instant action did not properly present a class action as required by the settled law in this state. Moreover, the proof adduced at the trial by the Appellees the action should have been dismissed at the close of the Appellees' case. In addition, the evidence indicated conclusively that the changed conditions in the subdivision in question have destroyed all . . .

EXCERPT FROM REPLY BRIEF OF APPELLANT

(Filed June 1, 1971)

. . . "class" by the named plaintiffs, and adequate representation of any such "class" by the named defendants.

With respect to the third Point on Appeal, Appellees have produced no authorities whatsoever which would support the unconstitutional order entered by the trial court below. The trial court has entered a mandatory injunction against unnamed defendants without affording those defendants any opportunity to be heard and without requiring any notice of any sort to be given to those defendants. The only case cited by Appellees in their Brief relative to representation of a class of unnamed defendants is *Wallace* v. *Adams*, 204 U.S. 415, 27 S.Ct. 363, 51 L.Ed. 547 (1907) (PB 5). In that case, the Supreme Court of the United States held that a specific individual named Hill, as a member of a class, was bound by a judgment entered against ten representatives of that class. In reaching

its decision, the United States Supreme Court pointed out that there were probably 1,000 members of the class and a specific Act of Congress provided that the specific class should be represented by ten members. Moreover, and most important with respect to the requirement of notice, the United States Supreme Court stated (51 L.Ed. at 553):

> "Hill, as every other citizen, was bound to take notice of the legislation of Congress, and it is not to be doubted that he, as well as others similarly situated, was cognizant of the proceedings that were being held in pursuance of such legislation. He made no application to transfer his case, but chose to abide by the outcome of the case against the ten representatives of his class."

To the contrary, in the instant case there is no indication from the record that any of the unnamed defendants had any knowledge whatsoever of the pendency of the Appellees' suit and there is certainly no indication that any such unnamed defendants chose to abide by the results of that suit. It can hardly be maintained that such unnamed defendants have been afforded the "due process" required by the Constitutions of the State of Florida and of the United States.

In relation to the Florida Rule of Procedure allowing class suits, it has been stated:

> "The controlling rule should be applied with a consideration of its history and the requirements of fairness, convenience, 'due process,' and the circumstances of the case. In other words, the provision for class suits is not a rule of law to be blindly followed without regard to the companion principle of law that no one can be bound by judgment affecting his property without his day in court." 24 Fla.Jur., *Parties*, §16, p.196.

Further, in discussing the propriety of a class action and the requiremnt of notice, the United States Supreme Court has stated in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314, (1950):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

CONCLUSION

In view of the deficiencies of the Appellees' allegations and proof relative to a proper class action, in view of the mutual disregard of the restrictive covenant here sought to be enforced, and in view of the unconstitutionality of the trial court's Order, the Order of the trial court herein should be reversed.

Respectfully submitted,

Fowler, White, Gillen, Humkey,
Kinney and Boggs, P.A.
Post Office Box 1438
Tampa, Florida 33601
Attorneys for Appellant
By: Edward M. Waller, Jr.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT,
LAKELAND, FLORIDA

Case No. 71-23

SUSAN MARAMAN,
Defendant-Appellant,

vs.

GRADY HARDISTER, et al.,
Plaintiff-Appellee.

PETITION FOR REHEARING

(Filed October 9, 1971)

COMES NOW the Appellant, by and through her undersigned attorneys, pursuant to Rule 3.14, Florida Appellate Rules, and files this her Petition for Rehearing directed to the per curiam opinion of this Court in this cause dated September 24, 1971, and states as follows:

1. This Court in its opinion of September 24, 1971, by affirming the order of the trial court, necessarily holds that Defendants "other parties unknown" are bound by the trial court's order directing such Defendants to remove certain trailers from the subdivisions in question.

We respectfully submit that this Court, in reaching this holding, may have overlooked or omitted consideration of the constitutional rights of said "other parties unknown" to be afforded due process under the Constitutions of the state of Florida and the United States. The effect of this Court's holding is to restrict the use by said "unknown parties" of their property even though said parties have been afforded no notice of the proceedings below nor an opportunity to participate in said proceedings.

2. This Court in its opinion of September 24, 1971, affirming the trial court's order has necessarily held that the Complaint of the Appellees properly states a class action as to the Plaintiffs and as to the Defendants. This holding is inescapable since this Appellant filed in this cause a Motion to Dismiss said Complaint on said grounds; the trial court denied said Motion; and said denial has been assigned as error by this Appellant on this appeal.

We respectfully submit that this Court, in reaching this holding, may have overlooked or omitted consideration of its holding in *Brown* v. *Ellingson*, 224 So.2d 391 (Fla. App. 2d Dist. 1969), the holding of the Fourth District in *Hendler* v. *Rogers House Condominium, Inc.*, 234 So.2d 128 (Fla. App. 4th Dist. 1970), and the decision of the Supreme Court in *City of Lakeland* v. *Chase National Company*, 32 So.2d 833 (Fla. 1947). This Court's holding in *Brown* v. *Ellingson, supra*, was based upon the prior decision of the Supreme Court in *Lakeland* v. *Chase National Company, supra*, and the decision of the Fourth District in *Hendler* v. *Rogers House Condominium, Inc., supra*, was based upon both of these prior decisions. Specifically, this Court in *Brown* v. *Ellingson* stated (224 So.2d at 395):

> "In other words, this court will not take judicial notice of the number of property owners on Crooked Lake."

Since there was absolutely no evidence of the number of members in the purported classes of Plaintiffs and Defendants in the instant case, it must be assumed that the trial court took judicial notice of those numbers or simply dispensed with the requirement of proof as to those numbers. In either case, the decisions of the Supreme Court, this Court and the Fourth District just cited clearly indicate that the trial court erred. Since this Court has not cited any of these decisions in its opinion and since the

Brief of the Appellees in this cause has likewise failed to mention any of these previous decisions, we respectfully submit that a rehearing of this question is called for.

In view of the foregoing, we respectfully request this Court to reconsider its opinion and, upon reconsideration, reverse the order appealed from.

Fowler, White, Gillen, Humkey,
Kinney and Boggs, P.A.
Post Office Box 1438
Tampa, Florida 33601
Attorneys for Appellant
By: Edward M. Waller, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been sent by mail this 8th day of October, 1971, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida 33601, Attorney for Appellee.

.....
Attorney

EXCERT FROM PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

(Filed December 23, 1971)

. . . it had jurisdiction of the parties, and the trial court's order purporting to bind unnamed and unknown Defendants without notice, Petitioner filed its appeal to the District Court of Appeal of Florida, Second District. (T 27-28)

5. On the foregoing facts, the Second District Court of Appeal was presented with the following questions of law:

I. Where Respondents have neither alleged nor proved adequate representation of any class by the named Plaintiffs or named Defendants and in view of the lack of certainty of identification of the members of any such class, did the trial court err in refusing to grant Petitioner's Motion to Dismiss and Motion at the Close of the Evidence?

II. Did the trial court err in entering an injunction against unnamed, unknown Defendants without notice and without an opportunity to defend themselves?

On both of the above questions of law, the Second District affirmed the decision of the trial court by a *per curiam* decision with no opinion. (T 10) In affirming *per curiam*, the Second District failed to distinguish, discuss or even cite the conflicting decisions mentioned hereinafter which were briefed and argued to the Second District. By affirming *per curiam*, the Second District held that a class action may properly be plead and maintained even though there is a complete absence of allegations and proof as to the adequate representation and certainty of identification of the members of the alleged class. Moreover, the Second District held that in a class action an injunction may be entered against unknown, unnamed Defendants without notice and without an opportunity to defend themselves.

EXCERPT FROM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

(Filed January 13, 1972)

II

THE HOLDING OF THE SECOND DISTRICT COURT OF APPEAL—THAT IN THIS PURPORTED CLASS ACTION AN INJUNCTION MIGHT PROPERLY BE ENTERED AGAINST UNKNOWN, UNNAMED DEFENDANTS WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY TO DEFEND THEMSELVES—CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT IN *CITY OF LAKELAND* v. *CHASE NATIONAL COMPANY*, 32 So.2d 833 (Fla. 1947) and *OSCEOLA GROVES* v. *WILEY*, 78 So.2d 700 (Fla. 1955)

In *City of Lakeland* v. *Chase National Company*, 32 So.2d 833 (Fla. 1947), in which the plaintiffs attempted to set up a class of defendants and serve process only on named representatives of the class, this Court found that the plaintiffs had not demonstrated the impracticability of proceeding against each of the members of the alleged class. Under these circumstances, this Court held that the principle of law "that no one can be bound by a judgment affecting his property without his day in court" would be violated and the alleged class action against the defendants would deprive the members of the class of due process. (32 So.2d at 838)

Similarly, in *Osceola Groves* v. *Wiley*, 78 So.2d 700 (Fla. 1955), in which this Court found no community of interest among the members of the alleged class of plaintiffs, this Court held that prosecution of the suit as a class suit could "well result in depriving such persons of their

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property without due process of law." (78 So.2d at 702-703)

The requirement of impracticability of joinder must be observed to preserve due process rights. This principle has recently been recognized as follows:

> ". . . It is generally agreed today that a class action should not be allowed if procedures more in keeping with traditional notions of due process are readily available. Actual joinder is always preferable when practicable. Impracticability of joinder, therefore, ought to be, and under modern rules is, a prerequisite to any kind of class action." Homburger, State Class Actions and The Federal Rule, 71 Col. L. Rev., 609, 614, April, 1971.

As we have noted above, the Respondents have failed to demonstrate impracticability of joinder of the members of the alleged classes. The Respondents have failed to give notice to all members of the alleged class of Defendants and have not afforded to those members an opportunity to defend themselves. Certainly, under these conditions, the injunction entered by the trial court against the Defendants as a class cannot be reconciled with even minimum requirements of due process.

When the failure of the Respondents to demonstrate impracticability is coupled with their failure to allege and prove adequate representation, the constitutional deficiencies in this case become even more evident. As recognized by this Court in *City of Lakeland* v. *Chase National Company, supra*:

> "The provision for class suits is not a rule of law to be blindly followed without regard to the companion principle of law that no one can be bound by a judg-

ment affecting his property without his day in court." (32 So.2d at 838)

In this respect, the decision of the Second District herein conflicts directly with the holdings of this Court in *City of Lakeland* v. *Chase National Company, supra,* and *Osceola Groves* v. *Wiley, supra.*

CONCLUSION

There is such a direct conflict between the decision of the Second District in this cause and the decisions cited hereinabove that the Second District did not even attempt to distinguish the cited cases. In view of the foregoing, the Petitioner respectfully submits a Writ of Certiorari should issue to the Second District Court of Appeal and the decision of the Second District herein should be quashed. The previous decisions of this Court and the Fourth District and the subsequent decision of the Third District should be approved by this Court as the controlling law of the State of Florida.

Respectfully submitted,

By: Edward M. Waller, Jr.
Attorney for Petitioner

Of Counsel:
Fowler, White, Gillen, Humkey,
Kinney and Boggs, P.A.
Post Office Box 1438
Tampa, Florida 33601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief in Support of Petition for Writ of Certiorari has been sent by mail this 12th day of January, 1972, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida 33601, Attorney for Respondents.

.....

Attorney

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

Case No. 41,884

SUSAN MARAMAN,
Petitioner,

vs.

GRADY HARDISTER, et al.,
Respondents.

PETITION FOR REHEARING

(Filed May 10, 1972)

COMES NOW the Petitioner SUSAN MARAMAN, by and through her undersigned attorneys, pursuant to Rule 3.14, Florida Appellate Rules, and files this her Petition for Rehearing directed to the Order of this Court in this cause dated April 25, 1972, and states as follows:

1. This Court in its Order of April 25, 1972, denying Petitioner's Petition for Writ of Certiorari has determined that it is without jurisdiction in this cause. We respectfully submit that this Court, in reaching that conclusion, may have overlooked or omitted consideration of the direct conflict between the decision of the Second District Court of Appeals sought to be reviewed herein and the decision

of the Fourth District Court of Appeal in *Hendler* v. *Rogers House Condominium, Inc.*, 234 So.2d 128 (Fla. App. 4th Dist. 1970). In the instant case, by ruling that the trial court properly denied your Petitioner's Motion to Dismiss, the Second District has held that a Complaint merely reciting the language of the rule and failing to plead either the number of members in the purported classes or that the numbers are so numerous that the court should take judicial notice thereof nevertheless states a proper class action. On the contrary, the Fourth District, in *Hendler* v. *Rogers House Condominium, Inc., supra,* in reversing the Order of the trial court denying a Motion to Dismiss, held that for a Complaint to state a proper class action it must allege the number of members in the particular class or must show that the number is so great that the court can take judicial notice thereof.

It is difficult to imagine a better example of a direct conflict between two decisions of different district courts of appeal. Unless and until this conflict is resolved by this Court, it must be anticipated that members of the bar in the Fourth District will follow one course of procedure and members of the bar in the Second District will follow another. Of course, members of the bar in the First and Third Districts will have to choose at their peril which course to follow.

2. Further, we respectfully submit that this Court, in determining it is without jurisdiction in this cause, may have overlooked or omitted consideration of the fact that the Order of the trial court affirmed by the Second District herein represents an unconstitutional deprivation of property without due process of law and, as such, clearly conflicts with the prior decisions of this Court in *City of Lakeland* v. *Chase National Company,* 32 So.2d 833 (Fla. 1947) and in *Osceola Groves* v. *Wiley,* 78 So.2d 700 (Fla. 1955).

The trial court's Order in this case purports to bind unknown, unnamed defendants without notice of the suit and without an opportunity to present any defense and the order sanctions this type of procedure solely on the basis of the Plaintiff's unproved allegations that the unknown, unnamed Defendants are the members of a class. The blatant unconstitutionality of the trial court's Order, as it purports to bind such Defendants, is remarkable. The Order of the trial court directed against such Defendants, in the absence of any proof whatsoever as to the impracticability of joining those Defendants, necessarily conflicts with the above-cited decisions of this Court. In those latter decisions, this Court has expressly recognized that class actions are constitutionally proper only where adequate representation and impracticability of joinder are *proved*. Without such proof, an attempted class action violates the principle that "no one can be bound by a judgment affecting his property without his day in court." *City of Lakeland* v. *Chase National Company, supra,* 32 So.2d at 838.

CONCLUSION

In view of the conflicts demonstrated hereinabove, we respectfully request this Court to reconsider its decision that it is without jurisdiction and, upon reconsideration, grant the Petition for Writ of Certiorari directed to the Second District Court of Appeal.

Respectfully submitted,

Fowler, White, Gillen, Humkey,
Kinney and Boggs, P.A.
Post Office Box 1438
Tampa, Florida 33601
Attorneys for Petitioner
By: Edward M. Waller, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been sent by mail this 9th day of May, 1972, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida 33601, Attorney for Respondents.

Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida and Appendix have been furnished by U.S. Mail, postage prepaid this 28th day of August, 1972, to John P. Griffin, Esquire, Post Office Box 8312, Tampa, Florida 33601, Attorney for Respondents and to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32302.

EDWARD M. WALLER, JR.

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